

State Bar of New Mexico and Communications Workers of America Local 7011, AFL-CIO, Petitioner. Case 28-RC-6077

March 24, 2006

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

The issue in this case of first impression is whether the State Bar of New Mexico is exempt from the Board's jurisdiction as a political subdivision under Section 2(2) of the Act. Pursuant to *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971) (*Hawkins County* or *Hawkins*), an entity is exempt from the Board's jurisdiction as a political subdivision if it is either: (1) created directly by the State so as to constitute a department or an administrative arm of the government,¹ or (2) administered by individuals who are responsible to public officials or to the general electorate.² As explained below, we find, contrary to the Regional Director and our dissenting colleague, that the State Bar of New Mexico is exempt as a political subdivision because it was directly created by the State as an administrative arm of the judicial branch of government. Thus, the Employer is exempt from the Board's jurisdiction.

On June 28, 2002, the Regional Director for Region 28 issued a Decision and Direction of Election (pertinent portions are attached as an appendix) in which he found that the Employer is not a political subdivision within the meaning of Section 2(2) of the Act and is subject to the jurisdiction of the Board. The Regional Director therefore directed an election in the petitioned-for unit of all full-time and regular part-time administrative assistants, desktop publishers, printers, assistants for publications/editors, marketing managers, referral assistants, secretary/receptionists, systems clerks, mail clerks, graphic artists, and Web Masters, employed at the Employer's Albuquerque, New Mexico facility.³

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. The Employer contends that it is not subject to the jurisdiction of the Board because it is exempt under Section 2(2) of the Act as a political subdivision under both prongs of the test set forth in *Hawkins County*, su-

pra. The Petitioner filed a brief in opposition. On September 10, 2003, the Board granted the Employer's request for review.

Having carefully considered the entire record, including the Employer's brief on review, we reverse the Regional Director and find that the Employer is exempt from Board jurisdiction as a political subdivision under Section 2(2) of the Act.

I. FACTS

The State Bar was initially created by statute in 1925 to operate as an agency of the New Mexico Supreme Court. In 1978, the New Mexico legislature revoked that statute. Simultaneously, the New Mexico Supreme Court (the Court), enacted Rule 24-101 of the Rules Governing the New Mexico Bar, "creating and continuing" the State Bar, pursuant to its powers under the New Mexico Constitution, in order "to aid the courts in improving the administration of justice." See Rule 24-101. The rule mandated that all persons licensed in New Mexico to engage in the practice of law be members of the State Bar in accordance with the rules of the Court.⁴ Pursuant to Rule 24-101A, the State Bar "may incorporate, sue and be sued, may enter into contracts and acquire, hold, encumber, dispose of and deal in and with personal and real property, and promote and further the aims as set forth herein and hereafter in these rules."

The State Bar, pursuant to the rule, was thereafter incorporated in 1978 under New Mexico law as a nonprofit corporation. The New Mexico Supreme Court established a governing board known as the Board of Bar Commissioners, comprised of 21 bar commissioners who are elected in districts by attorney-members of the State Bar.⁵ Rule 24-101-C. The Court also established the districts and number of bar commissioners to be elected from each district. Rule 24-101-D. Vacancies on the board are filled by appointment of the Board, and appointed commissioners serve until the next election. Rule 24-101-F. The Board of Bar Commissioners may select and employ an executive director, who, among other things, serves as the chief operating officer of the State Bar and is charged with the supervision of the Employer's employees.

The State Bar receives the bulk of its operating revenues from the mandatory dues of its members. The

¹ See, e.g., *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000).

² See *Concordia Electric Cooperative*, 315 NLRB 752 (1994).

³ Contrary to the Petitioner, the Employer sought to exclude the Web Master as a managerial employee. The Regional Director found that the Web Master is not a managerial employee. The Employer did not request review of this finding.

⁴ Because membership in the State Bar is a condition for the practice of law in the State, the New Mexico State Bar is an "integrated" bar, as opposed to a "voluntary" bar association, in which membership is at the discretion of attorneys. The two types of bar associations raise different sets of issues under Federal law. Thus, all cases cited herein dealing with State bar associations will deal with integrated bars.

⁵ The chair of the Young Lawyers Division and the elected delegate of the Senior Lawyers Division also serve on the commission.

Court exercises control over the mandatory dues paid by bar members by approving the fees and dues structure.⁶ No dues increase can be made without such approval.⁶ The Court has retained final review authority over the financial operations of the State Bar by requiring that the Employer submit its budget for Court approval. The State Bar is also required to have an annual audit and provide a copy of the audit to the Court. Members of the Board of Bar Commissioners receive no pay from the State of New Mexico, and their only compensation is for travel-related expenditures, which are reimbursed directly by the Employer. Rule 24-102.

At the time of the New Mexico Supreme Court's enactment of Rule 24-101, et seq., the State adopted an "exclusion" statute, which provides as follows: the Board of Bar Commissioners of the State Bar and the State Board of Bar Examiners are "bodies of the judicial department and are not a state agency nor their employees public employees for purposes of workmen's compensation coverage, public employment retirement programs or social security coverage." New Mexico Statutes Annotated (N.M.S.A.) 1978, 36-2-9.1 (1979). The Employer has the authority to set the terms and conditions of employment for the petitioned-for unit without any apparent oversight or approval by the Court or any State entity.

II. THE REGIONAL DIRECTOR'S DECISION AND CONTENTIONS OF THE PARTIES

As noted above, the Regional Director found that the Employer is not exempt from Board jurisdiction under the first prong of *Hawkins County* because the Employer was not created directly by the State of New Mexico so as to constitute a department or administrative arm of the government. The Regional Director reasoned that the Employer is a nonprofit corporation created to enhance the legal profession and provide services to the attorneys of New Mexico. Its bylaws and operating policies were neither created nor implemented by the New Mexico Supreme Court, but by the Board of Bar Commissioners, the members of which are elected by the attorney-members. In addition, the Regional Director interpreted N.M.S.A. 36-2-9.1 as excluding the Employer's employees from consideration as State employees, noting that they appear to have none of the employment terms and conditions enjoyed by their State employee counterparts. The Regional Director further noted that the Employer's funding is derived strictly from private sources, with no State moneys funding its operations. Further, the Re-

gional Director noted that the Employer is required to pay property taxes on the State Bar Center Project.

The Employer contends that it is not subject to the Board's jurisdiction. First, the Employer maintains that based on the face of the enabling documents, the State Bar meets the first prong of the *Hawkins County* test.⁷ In the Employer's view, when the New Mexico Supreme Court created the State Bar under Rule 24-101, the State Bar retained the same fundamental purposes it had under the 1925 statute. Further, the Employer asserts that although the Court chose to delegate extensive authority to the State Bar's governing body (the Board of Bar Commissioners), the Court itself has retained final review authority over the financial operations of the State Bar by requiring that the governing body submit annually its financial records for review and audit by the New Mexico Supreme Court. In addition, the Employer contends that the State Bar's existence, purposes, and functions depend entirely on Rule 24-101, et seq., and that the Court retains the power to amend these rules and has done so in the past. Finally, the Employer contends that as an integrated State bar, it is an arm of the State under the 11th Amendment of the Constitution.⁸

The Petitioner contends that the Employer was not created by the State to constitute a department or arm of the government; that in repealing the original legislation creating the State Bar, the State legislature created a private corporation separate from the State government. The Petitioner argues further that the Supreme Court's control of the Employer's finances consists simply of a cursory review of its budget; that the Employer receives no funds from the State government and must pay taxes on some of its operations. In addition, the Petitioner contends that the Employer's employees work under terms and conditions of employment governed by the Employer, not the State; that they are not subject to civil service regulation and cannot transfer to State positions.

⁷ The Employer contends that the State Bar also meets the second prong of the *Hawkins County* test because the State Bar is administered by individuals who are accountable to justices who are public officials elected to hold seats on the New Mexico Supreme Court. The Regional Director rejected this argument. We find it unnecessary to reach this issue and thus do not address this argument.

⁸ To lend further support to its argument, the Employer points out that the New Mexico Risk Management Division's Legal Bureau (RMD) represented the State Bar in the matter of *Ronald A. Bell v. the Legal Advertising Committee*, in 1996. The RMD is a New Mexico State agency whose mission is to protect the State's assets against property, liability, and workers' compensation losses, and this agency does not, and cannot, provide legal services to any entity other than a State agency or a State university. The lawsuit was brought against the Legal Advertising Committee of the Disciplinary Board by an attorney-member of the Bar.

⁶ For instance, when the State Bar proposed the building of a State Bar Center in 1989, the State Bar had to obtain authorization from the Court for a dues increase to fund the project.

Thus, the Petitioner requests that the Board affirm the Regional Director's Decision.

We have carefully considered the parties' arguments, and we find, for the reasons stated below, that the Employer is exempt from the Board's jurisdiction under the first prong of the *Hawkins County* test.

III. DISCUSSION

A. Application of the First Prong of *Hawkins County* to the State Bar

Under the first prong of the *Hawkins County* test, in order to be exempt from the Act as a political subdivision, the entity must be "created directly by the state so as to constitute departments or administrative arms of the government." 402 U.S. at 604. (Emphasis added.) In this case, we find that the State Bar was created directly by the New Mexico Supreme Court as an administrative arm of the judicial branch of government, and, thus, is an exempt political subdivision under Section 2(2) of the Act. In addition, we find that the degree of control exercised over the purposes and structure of the State Bar further supports our finding that the State Bar is an administrative arm of the New Mexico Supreme Court.

1. The State Bar was created directly by the State of New Mexico

As stated above, the operative events in the creation and development of the State Bar, as it is constituted today, were: (a) its creation in 1925 by the State legislature to operate as an agency of the New Mexico Supreme Court; (b) the 1978 repeal of that statute; (c) the 1925 statute's replacement by the 1978 statute defining the Board of Bar Commissioners and the State Board of Bar Examiners as "bodies of the judicial department," and (d) the New Mexico Supreme Court's simultaneous implementation of Rule 24-101, which stated that "[a]cting with powers vested in it by the Constitution of this state . . . [t]he Supreme Court of New Mexico does hereby create and continue an organization known as the State Bar of New Mexico, all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of New Mexico in accordance with the rules of this court."

It is evident from the face of the 1925 legislation that the State Bar was originally created by the State of New Mexico to operate as an agency of the State government, and, thus, that the Employer would have been exempt from Board jurisdiction under the first prong of the *Hawkins County* test if the issue had arisen prior to 1978. To determine its status now, we must consider whether the 1978 legislative changes, taken together with the promulgation of Rule 24-101, et seq., altered the nature or the

functions of the State Bar so as to remove the exemption. Contrary to our dissenting colleague, we find that they have not so changed. The Employer, as currently constituted, remains a direct creation of State government—"create[d] and continue[d] by the New Mexico Supreme Court"—and continues to perform the same functions for the New Mexico judiciary as it did prior to 1978, namely, assisting in the regulation of the legal profession. It is well settled that the order of a State Supreme Court providing for a State bar association has the authority of a "statute." *Lathrop v. Donahue*, 367 U.S. 820, 824 (1961) (Federal statute authorizing appeal to Federal court of suit challenging validity of State statute covers Supreme Court orders establishing integrated bar, as an "act legislative in character to which the state gives its sanction"). (Citations omitted.) Thus, as in *Hawkins County*, it is plain on the face of the enabling state documents that the State Bar is a political subdivision.

Our dissenting colleague argues that the State Bar is not a creation of the State government because it was "created and continued" pursuant to an action by New Mexico's judicial branch, and questions *Lathrop's* applicability to a case analyzing the jurisdictional reach of the Act. We disagree. *Lathrop* addresses a core issue presented by this case—the status of an act by a State judiciary establishing an entity to regulate activity within the State, and, thus, its analysis is entirely pertinent. In this regard, nothing in *Hawkins County* limits the scope of the Act's exemption of the first branch of political subdivisions—entities that are "created directly by the State, so as to constitute departments or administrative arms of the government"⁹—to employers created pursuant to enactment of State legislatures. Thus, the question of the status of an employer created by an act of the judiciary remains open under *Hawkins*, and *Lathrop* effectively answers that question. In holding that the State Supreme Court's order establishing the integrated bar in Wisconsin was a "statute" for purposes of Supreme Court review, the *Lathrop* Court found that the "legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive It is not necessary that the state legislature itself should have taken the action drawn in question. In construing [a] similar jurisdictional provision . . . we said: 'any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State.'" 367 U.S. at 824. (Emphasis added and citations omitted.) Thus, the *Lathrop* Court found that States can act "legislatively" through other branches of government, and that the key attribute of such legislative action is that

⁹ *Hawkins County*, supra, 402 U.S. at 604.

it has the force of law, and the *Lathrop* Court further found that a State Supreme Court's establishment of an integrated State bar has the force of law. It is undeniable that New Mexico's establishment of an integrated State bar also has the force of law. Thus, we find no cognizable distinction, under *Hawkins County*, between the State Supreme Court's enactment of a rule creating the bar and the State legislature's enactment of a statute creating it.

2. The State Bar was created to assist the judicial branch of the State of New Mexico in regulating the legal profession

The State of New Mexico requires that, in order to maintain State licensure, attorneys must be members of the State Bar and must pay its established annual dues. Under Rule 24-101, the New Mexico Supreme Court retains overall authority to regulate the practice of law in New Mexico and to continue and control the character and activities of the State Bar, acting "within the powers vested in it by the constitution of this state and its inherent power over members of the legal profession as officers of the court." Rule 24-101 explicitly sets forth the purposes of the State Bar, which include aiding the courts in improving the administration of justice, improving relations between the legal profession and the public, encouraging and assisting in the delivery of legal services, providing a forum for the discussion of the practice of law and law reform, and participating in State lawmaking processes.

3. The State Bar fulfills regulatory functions on behalf of the New Mexico Supreme Court

The State Bar oversees and administers committees and boards of the State Bar to ensure compliance with and enforcement of the Court's rules. These bodies include the Legal Advertising Committee of the Disciplinary Board, the Board of Bar Examiners, the Legal Specialization Board, and the Minimum Continuing Education Board. The State Bar has the authority to bring suit on behalf of the public for the unlicensed practice of law. *State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943 (N.M. 1978).

The State Bar monitors and enforces New Mexico's requirement that licensed attorneys pay State licensing fees. If a member fails to pay the mandatory dues, the State Bar certifies the name of the member to the Court, which suspends the member from practice. If the Court suspends a member, he must petition the Board of Bar Commissioners for reinstatement, after paying all fees and penalties. The State Bar has the authority to waive the license fee in case of hardship. If the State Bar refuses to do so, the member has the right to petition the Court for reversal of the decision.

4. The New Mexico Supreme Court controls the governing structure of the State Bar

Under Rule 24-101, et seq., the Court:

- established the governing board of the State Bar, (the Board of Bar Commissioners);
- specified the composition of the Board;
- established the districts from which the Bar Commissioners are elected, the procedures for nomination and election of commissioners, the commissioners' terms of office, and the procedures for filling vacancies on the Board;
- provided for the manner in which the Bar Commissioners are elected, their terms of office, the manner for filling vacancies and submitting nominations. Rule 24-101(D)-(I);
- retained the sole power to alter these central aspects of the State Bar's governing structure.

5. The New Mexico Supreme Court exercises substantial control over the State Bar's priorities and operations

Although the Board of Bar Commissioners is permitted to write and adopt bylaws applicable to the Employer, its discretion is limited by the Court's requirement that the bylaws conform with the rules establishing the State Bar. Rule 24-101 C provides that "any such bylaws inconsistent with these Rules shall be invalid." The Court has retained jurisdiction to review all bylaws for compliance with this requirement. In addition, the record evidence shows that the Court has mandated the following activities of the State Bar:

- The Employer is required to publish a weekly periodical, the "Bar Bulletin," which notifies the membership of case holdings in the New Mexico courts, minutes of pertinent meetings (including the bar commissioners' meetings), and other items of interest to the membership.
- The State Bar's Executive Director has worked with the Court to create an annual continuing legal education (CLE) requirement and a mandatory professionalism program for New Mexico attorneys. Court approval of the program depended on the effectuation of the Court's directives as to the details of the program.
- The Executive Director also worked with the Court on the creation of a Commission for Professionalism, which was ultimately created by an order of the Court and issued by

publication in the Bar Bulletin. The Court specified the direction of the initiative and the composition of the Commission.

- In setting up the Bar's Technology Committee, the Court chose the members and dictated the committee's functions and findings. Moreover, the Court rejected, over the vote of the Board of Bar Commissioners and Bar members, the recommendations of the Bar's multi-jurisdictional task force.
 - The Court directed the manner in which the Consumer Attorney Assistance Program should implement its program.
 - Rule 24-103, as well as N.M.S.A. 36-2-26, mandates that the State Bar hold an annual meeting; the Court's approval is required to hold the meeting out of state.
6. Through its authority to review and its power of final approval, the New Mexico Supreme Court exercises significant control over the Employer's budget

The Court requires the State Bar to undergo an annual audit and provide a copy to the Court. The Court has the right of review over the State Bar's chief source of operating funds, the dues of its members. The Court approves the fees and dues structure, and no dues increase can be made without such approval. The Court's approval was required to raise the fees charged new admittees to the Bar.

The Court requires the State Bar to maintain a client protection fund to reimburse citizens who have claims against attorney members. The Bar Commissioners sought the Court's approval to eliminate the fund and direct the money to other programs. The Court rejected the proposal. The Employer submitted a second proposal, incorporating the Court's advice, which was approved.

In 1989, the State Bar proposed the building of a State Bar Center. Authorization from the Court was required both for the project and for a dues increase to fund the project.

B. Consistency of the State Bar's Exemption with Other Cases Interpreting Hawkins County

In determining whether an employer is exempt from Board jurisdiction under *Hawkins County*, the Board has analyzed the establishment and operations of numerous entities that perform services for State governments and their branches to determine if they are exempt under the first prong of the *Hawkins County* test. The Board found

that the following types of employers, among others, are not exempt:

- an employer incorporated as a private business entity to perform health-care services for a state, *Methodist Hospital of Kentucky*, 318 NLRB 1107 (1994), enfd. in relevant part sub nom. *Pikesville United Methodist Hospital of Kentucky v. United Steelworkers of America*, 109 F.3d 1146 (6th Cir.), cert. denied 522 U.S. 994 (1997);
- an entity organized as a private corporation to review grants to a public university system, *Research Foundation of the City University of New York*, 337 NLRB 965 (2002);
- an entity that contracted with a state to perform services for citizens with special needs, *Jefferson County Community Center*, 259 NLRB 186 (1981), enfd. 732 F.2d 122 (10th Cir. 1984).

Each of these employers failed the first prong of the *Hawkins County* test because no special act of the State was required to bring the relevant entity into existence. On this key point, these employers stand in contrast to the Employer here.

The State Bar exists pursuant to State action and owes its entire existence to the will of the State of New Mexico. The Employer here, shares this key characteristic of political subdivision status with the agencies in cases such as *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000); *Madison County Mental Health Center*, 253 NLRB 258, 259 (1980); and *Association for the Developmentally Disabled*, 231 NLRB 784, 786 (1977), in which agencies were created pursuant to State statute to discharge a State function, e.g., promoting economic development or caring for mentally disabled citizens. The Employer here, both before and after the 1978 legislative changes, exists to fulfill a State purpose: "[t]he regulation of the activities of the bar is at the core of the state's power to protect the public." *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977).

We further disagree with the Regional Director's emphasis on N.M.S.A. 36-2-9.1 in finding that the Employer is not a political subdivision. As set forth above, this statute declares that the commissioners of the State Bar and the State Board of Bar Examiners "are bodies of the judicial department," and "their employees [are not] public employees for purposes of workmen's compensation coverage, public employment retirement programs or social security coverage." As an initial matter, the statute on its face is narrowly drawn. It evinces no legislative intent to define comprehensively, even under State

law, the status of the employees in the petitioned-for unit. Moreover, the statute specifies that the State Bar is a body of the judicial department, which weighs against a finding that it is a private employer. Further, the Supreme Court held in *Hawkins County* itself that Federal, not State, law controls the determination of whether an entity is a “political subdivision” exempt from Board jurisdiction. 402 U.S. at 603–604.¹⁰

Thus, our dissenting colleague’s and the Regional Director’s emphasis on the lack of involvement of the New Mexico Supreme Court in setting the conditions of employment in the petitioned-for unit is also misplaced, in light of the clear evidence that the State Bar was created directly by the State and functions primarily to administer the State’s rules governing the practice of law. See, e.g., *City Public Service Board of San Antonio*, 197 NLRB 312 (1972) (the employer satisfied the criteria established by the Board for determining political subdivision status, notwithstanding the employer’s autonomy in day-to-day operations and in labor relations). The key question in determining the status of an entity as a political subdivision is the body of Federal labor law interpreting the Act.

This case is distinguishable from *St. Paul Ramsey Medical Center*, 291 NLRB 755 ((1988), an advisory opinion on which our dissenting colleague relies. In that case, the relevant statutory provisions indicated that the State did not intend Ramsey Health Care (RHC) and its subsidiary to be departments or administrative arms of the government. Further, the RHC had substantial powers independent of the government. Thus, the RHC had the statutory authority and “all necessary power,” without evidence of further review by or accountability to the State, to, inter alia, prepare its own budget, acquire real and personal property, incorporate other nonprofit or for-profit corporations, merge or consolidate with other foreign or domestic health care corporations, borrow funds, or take any other action relative to the delivery of health care services that could be taken by a private nonprofit corporation. *Id.* at 755.

The instant case differs in both respects. The relevant statute in the instant case explicitly states that the State Bar is an arm of the judicial branch of government. Further, the evidence shows that the New Mexico Supreme Court has retained final review authority over the financial operations of the State Bar by requiring that the Em-

ployer submit its budget for Court approval, exercising control over the Bar’s fees and dues structure, and receiving a copy of the Bar’s required annual audit. Unlike in *St. Paul*, supra, the Court oversees and administers the committees and boards of the State Bar to ensure compliance with and enforcement of the Court’s rules, controls the governing structure of the State Bar, and exercises substantial control over the Bar’s priorities and operations. Indeed, the State Bar’s bylaws must conform to the rules established by the State Bar.¹¹

C. Consistency of State Bar’s Exemption with Treatment of Integrated Bars in Other Areas of Federal Jurisprudence

Our finding that the State Bar is a political subdivision under the first prong of the *Hawkins County* test is supported by decisions of the United States courts of appeals finding that other integrated State bar associations are immune from suit as State agents under the Eleventh Amendment of the Constitution, which provides for sovereign immunity for the States.¹² “The Eleventh Amendment bars suit against an entity in addition to the state itself, when the defendant is an “arm” or “alter ego” of the state.” *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 400 (7th Cir. 1996). Every circuit court that has addressed the issue of an integrated State bar association’s sovereign immunity has found the State bar to be immune from suit in Federal court under the 11th Amendment as an arm of the State.¹³ See also *Washing-*

¹¹ *Truman Medical Center*, 239 NLRB 1067 (1978), *enfd.* 641 F.2d 570 (8th Cir. 1981); and *California Inspection Rating Bureau*, 215 NLRB 780 (1974), relied on by our dissenting colleague, are also distinguishable from the instant case. In *Truman Medical Center*, the employer succeeded the State health department as the operator of a hospital under a contract for services, and, thus, is clearly distinguishable from the Employer here; in *California Rating Bureau*, the employer provided special rating services to insurance companies and reported its findings to the insurance commissioner, but the State’s insurance statute provided for competing organizations performing the same services. Further, as in *St. Paul’s*, supra, the employers in these cases were subject to less State control than that exerted in the instant case.

¹² Courts have noted that the Act’s political subdivision exemption “has its ultimate basis in the Tenth Amendment considerations of state sovereignty and the 11th Amendment grant of judicial immunity to the states.” *Crestline Memorial Hosp. Assn. v. NLRB*, 668 F.2d 243, 245 *fn.* 1 (6th Cir. 1982).

¹³ *Lewis v. Louisiana State Bar Assn.*, 792 F.2d 493 (5th Cir. 1986); *Bishop v. State Bar of Texas*, 791 F.2d 435 (5th Cir. 1986); *Kremp v. Dobbs*, 775 F.2d 1319, 1321 *fn.* 1 (5th Cir. 1985); *Neilson v. State of Michigan*, *mem.* 181 F.3d 102 (6th Cir. 1999); *Thiel*, supra, 94 F.3d at 402–403; *Gilchrist v. Arizona Supreme Court*, *mem.* 10 Fed. Appx. 468 (9th Cir. 2001), *cert. denied* 534 U.S. 996 (2001); *Broening Oberg Woods Wilson & Cass v. State Bar of Nevada*, *mem.* 172 F.3d 875 (9th Cir. 1999); *Lupert v. California State Bar*, 761 F.2d 1325 (9th Cir. 1985), *cert. denied* 474 U.S. 916 (1985); *Ginter v. State Bar of Nevada*, 625 F.2d 829, 830 (9th Cir. 1980); *Doyle v. Oklahoma State Bar Assn.*,

¹⁰ Thus, we recognize that the State of New Mexico has legislated that the employees of the Employer are employees of “the judicial department” of government, rather than employees of the executive or legislative branches. But this State declaration does not contradict the undeniable fact that the judicial department is, in the words of *Hawkins County*, a “department [] . . . of the government.” 402 U.S. at 604.

ton Legal Foundation v. Texas Equal Access to Justice Foundation, 94 F.3d 996, 1005 (5th Cir. 1996) (11th Amendment immunity extends to the Texas Equal Access to Justice Foundation because the Texas Supreme Court created it pursuant to its rule-making authority).¹⁴

Thiel, supra, is particularly instructive. In *Thiel*, as here, the rules of the State Supreme Court were enforced by and through the State bar. Attorneys sued the Wisconsin State Bar, alleging that the rule permitting the Bar to use compulsory dues to fund certain purposes was unconstitutional. The court found that the Wisconsin State Bar was “vested with sufficient state characteristics to qualify for sovereign immunity,” and, thus, is immune from suit under the 11th Amendment. 94 F.3d at 401 (quoting *Crossetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1402 (7th Cir. 1993)). The court relied on two factors: the extensive control that the Wisconsin Supreme Court exercised over the Bar, and the Bar’s agency relationship with the Wisconsin Supreme Court in promulgating the challenged rule. *Id.* at 402–403.

The examples of the Wisconsin court’s control over the Bar cited by the court in *Thiel* closely parallel the controls that the New Mexico Supreme Court exercises over the State Bar in this case: the Wisconsin Supreme Court created the Bar; retained control over Bar dues and the Bar’s budget “in a variety of ways”; established the manner in which the Bar conducts its daily business, the Bar’s governing bodies, offices, powers, functions, and duties; and retained authority of review over amendments of the Bar’s bylaws. *Id.* at 402.

In finding that the Wisconsin Supreme Court exercised “sufficient control over the Bar [to find] Eleventh Amendment immunity,” however, the court recognized that the Supreme Court did not “micromanage every as-

pect of the Bar.” *Id.* Citing powers identical to those delegated to the Employer here, the court noted that the Wisconsin Bar may sue and be sued, enter into contracts, hold property, and handle its own personnel matters. *Id.* The court concluded that these factors did not negate the fact that the “Wisconsin Supreme Court has sufficient control over the Bar to weigh in favor of invoking Eleventh Amendment immunity.” *Id.*¹⁵

Conclusion

In sum, we find that, based on the plain language of the statutes and rules of the State of New Mexico, the State Bar was created by the New Mexico Supreme Court pursuant to its rulemaking authority, and serves as an administrative arm of the Court. The State Bar assists the judicial branch in regulating the legal profession. The language of Rule 24-101 specifically created and continued the State Bar, which had initially been created by statute to operate as an agency of the Court, and this rule has been and may be amended by the Court. The New Mexico legislature simultaneously adopted a statute specifically defining the Board of Bar Commissioners and the State Board of Bar Examiners as “bodies of the judiciary department.” Finally, the New Mexico Supreme Court exercises substantial control over the State Bar. Accordingly, the State Bar is a political subdivision exempt from the Board’s jurisdiction, and the petition should be dismissed.

ORDER

The Regional Director’s Decision and Direction of Election asserting jurisdiction over the Employer is reversed, and the petition is dismissed.

MEMBER WALSH, dissenting.

The majority finds that the State Bar of New Mexico is exempt from the Board’s jurisdiction as a “political subdivision,” even though it was established as a nonprofit corporation, is administered by private citizens, and is governed by documents that specifically say that it is *not* a State agency and its employees are not public employees. The majority comes to this conclusion primarily because the State Bar was established under the authority of a rule promulgated by the New Mexico Supreme Court, and it performs functions which aid the Supreme Court in the administration of the judicial system of the

787 F.Supp. 189 (W.D. Okla. 1992), *affd.* 998 F.2d 1559 (10th Cir. 1993); *Kaimowitz v. Florida Bar*, 996 F.2d 1151 (11th Cir. 1996).

¹⁴ Our dissenting colleague summarily dismisses this precedent as “having no bearing here.” We respectfully disagree. This case presents an issue of first impression in a difficult area of the law. *Thiel*, supra, and other 11th Amendment cases cited here have examined integrated State bars to determine the degree to which the States have endowed the bars with “state characteristics.” In *Thiel*, as discussed above, the court, in large part, assessed the extent of the State Supreme Court’s control over the functions of the State bar and whether the bar had acted as an agent of the State in propounding the rule at issue. This inquiry closely parallels the settled approach of the Board and courts in determining whether an employer is a political subdivision. In *Hawkins County*, supra, the Court found that the inquiry into the status of an employer as a possible political subdivision involves examining the “actual operations and characteristics” of the employer. 402 U.S. at 604, quoting *NLRB v. Hearst Publications*, 322 U.S. 111, 123 (1944). State control over the employer and the employer’s role in effectuating State purposes are intrinsic to these “operations and characteristics,” and the courts’ careful examination of these factors, albeit in the context of an 11th Amendment inquiry, serves to guide our own inquiry.

¹⁵ The Regional Director found that the State Bar’s sovereign immunity argument contradicts the rule’s provision that the Employer may “sue and be sued.” In *Thiel*, the court explicitly rejected this position. The court explained that “in order to waive Eleventh Amendment immunity, a state statute or constitutional provision must do so in explicit language . . . it must specify the State’s intention to subject itself to suit in *federal court*.” 94 F.3d at 403 (quoting *Atascadero State Hospital*, 473 U.S. 234, 241 (1985)) (emphasis in original).

State of New Mexico. The majority cites no authority that mandates this result; rather, the majority relies primarily on cases that hold that other State bar associations are immune from suit in Federal court under the 11th Amendment to the U.S. Constitution.

At best, this is a close case involving a private, non-profit enterprise, with some functions that are public in nature. In these circumstances, and in the absence of any clear authority establishing that the State Bar is a political subdivision, as that term is used in Section 2(2) of the Act, the Board should assert jurisdiction. If we refuse to do so in a close case because of an expansive reading of a jurisdictional exemption, we abdicate our responsibility to assure employees the fullest freedom to exercise the rights guaranteed by the Act. As the Board has recently recognized, the “exemptions provided in Section 2(2) are to be narrowly construed.” *San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1058 (2004).

I.

The applicable test is whether the State Bar of New Mexico (State Bar) was created directly by the State so as to constitute a department or administrative arm of the government. *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604 (1971).¹ The original State Bar was, in fact, created by the State of New Mexico to serve as an arm of the New Mexico Supreme Court.

However, the State statute that created the State Bar was repealed in 1978. The reconstituted State Bar, in contrast, was not created by the authority of a State statute. Instead, it was created under the authority of a rule promulgated by the New Mexico Supreme Court, and it was incorporated as a nonprofit corporation.² The rule provided that the State Bar would be administered by a

¹ An entity can also be a political subdivision if it is “administered by individuals who are responsible to public officials or the general electorate.” *Id.* at 604–605. The majority does not reach this “second prong” of the *Hawkins County* analysis; for reasons explained below, I would find that the State Bar does not meet this test either.

² The majority asserts that the State Bar remains a direct creation of the State government because the New Mexico Supreme Court’s 1978 rule is tantamount to a State statute. It relies on *Lathrop v. Donahue*, 367 U.S. 820, 824 (1961), rehearing denied 368 U.S. 871 (1961). In *Lathrop*, the Court found that an order of the Wisconsin Supreme Court that integrated the Wisconsin Bar was cognizable under 28 U.S.C. § 1257(2), which provides for appeal to the Supreme Court where the validity of a “statute” is thrown into question. This case, however, does not involve the narrow issue of whether a rule enacted by the New Mexico Supreme Court qualifies as a “statute” for purposes of Supreme Court jurisdiction. And in any event, even if the New Mexico Supreme Court’s rule were to be considered a “statute,” the rule itself does not create the New Mexico State Bar, and there is nothing in the rule which states that the State Bar is created as a State agency. The rule simply authorizes the creation of the State Bar, and in fact it was created as a private, nonprofit corporation.

Board of Bar Commissioners, who are not appointed by the Court, but rather are elected by fellow members of the State Bar.

A New Mexico State statute expressly provides that the Board of Bar Commissioners and the State Board of Bar Examiners are “bodies of the judicial department and *are not a state agency* nor their employees public employees for purposes of workmen’s compensation coverage, public employment retirement programs or social security coverage.” New Mexico Statutes Annotated 1978, 36-2-9.1 (emphasis added). Accordingly, the members of the Board of Bar Commissioners receive no pay from the State, and their only compensation is for travel-related expenditures, which come out of private funds and are paid directly to them by the State Bar.

The State Bar’s employees receive none of the special benefits granted to State employees. They do not receive their paychecks from the State, are not subject to State civil service rules, and they are not allowed to transfer to other State positions. They work under the supervision of an executive director, who is also not a State employee. The State Bar hires and trains its own employees, and all of their terms and conditions of employment are governed by an extensive employee handbook which the State Bar itself developed and implemented with no oversight or approval by the Supreme Court or any other public entity. The State Bar provides its own benefit package to its employees and pays all of their wages and benefits from private, not public, funds.

As the majority acknowledges, in determining whether an entity is an exempt political subdivision under the first prong of the *Hawkins County* test, we look first at the governing documents to determine the intent of the enabling or governing body. See *Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000); *St. Paul Ramsey Medical Center*, 291 NLRB 755, 757 (1988). There is nothing in the Supreme Court’s 1978 rule authorizing the establishment of the State Bar, or in the statutes relating to the Board of Bar Examiners, which expressly states any intent to establish the State Bar as a State Agency. In fact, New Mexico Statutes, Chapter 36-2-9.1, expressly states that the Board of Bar Commissioners and the State Board of Bar Examiners of the State bar are *not* state agencies, nor are their employees to be considered public employees.³ This is in marked contrast

³ Thus, the majority’s assertion that the State of New Mexico has legislated pursuant to New Mexico Statutes, Chapter 32-29-1 that the employees of the State Bar are employees of the “judicial department” is unfounded. The statutory language describes the Board of Bar Commissioners as a “bod[y] of the judicial department,” but it does not describe the State Bar’s employees as employees of the “judicial department.” Indeed, the State Bar, established as a nonprofit corporation and administered by private citizens, hires and sets terms and condi-

to the 1925 statute that originally created the State Bar to operate as an agency of the Supreme Court of New Mexico, but was repealed in 1978.

The Supreme Court's 1978 rule allows the State Bar to incorporate, sue and be sued, enter into contracts, and own and dispose of real property. Pursuant to the rule, the State Bar was incorporated as a nonprofit organization. To administer the State Bar, the Board of Bar Commissioners employs an executive director, who is not a State employee. The State Bar's funding is strictly from private sources, with no State moneys funding its operations. The State Bar is authorized by its bylaws to engage in extensive lobbying activities. Although the New Mexico Supreme Court must approve the State Bar's budget, it generally does so without comment. The only exception was one occasion when the Supreme Court remanded the proposed budget to the State Bar for an amendment.

Not only are the State Bar's employees not considered public employees for most purposes, but neither the Supreme Court nor any other State entity has any authority to interfere in the State Bar's personnel or labor relations decisions. The State Bar's employees have no recourse to any governmental body with respect to grievances, discipline, or any employee concerns. Their employee handbook repeatedly emphasizes that the sole authority over all terms and conditions of employment lies with the State Bar, its management, and its executive director. The State Bar pays its own employees from its own budget, and provides its own benefit package.

II.

The majority minimizes the State Bar's control over its own employees. Instead, it emphasizes the State Bar's quasi-public functions: assisting the Supreme Court in regulating and promoting the legal profession. Under significant Board precedent, however, nonprofit organizations that perform quasi-public functions are *not* in fact political subdivisions exempt from the Board's jurisdiction.

In *St. Paul Ramsey Medical Center*, supra, 291 NLRB 755, the employer was originally set up by statute as an exempt political subdivision. The statute was subsequently repealed, and a new statute was passed which created a nonprofit public corporation known as Ramsey Health Care, Inc. (RHC). RHC's statutory purpose was to engage in the provision and delivery of health care and related services. *Id.* at 755. The new statute directed RHC to create a hospital subsidiary corporation respon-

sible for governing and operating the medical center. The statute expressly provided that RHC would have powers that were withheld from the former commission such as the power to prepare an annual budget, to borrow funds, and to purchase real property. It further provided that the hospital subsidiary corporation, like the State Bar in this case, would be separately organized and incorporated rather than directly created by the State. The Board found it significant that the act provided that the employees of both RHC and the hospital subsidiary corporation were excluded from coverage under the State public employment labor relations act and the State public employee retirement act, indicating an intent to privatize the day-to-day operations of the Medical Center.

Like the State Bar in this case, the employer medical center in *St. Paul Ramsey Medical Center*, as managed and operated by RHC and the hospital subsidiary corporation, had some of the attributes of a public entity. The Board nevertheless found that the State did not intend for either RHC or the hospital subsidiary corporation to be created as departments or administrative arms of the government. *Id.* at 757–758. Similarly, in this case, the balance of the relevant factors indicates that the State did not intend for the State Bar to be created or to operate as an administrative arm of government.⁴

Thus, there is clear Board authority finding that quasi-public, nonprofit organizations like the State Bar—which may be subject to some control of a State entity, and which have some semipublic functions in aid of State government, but which retain control over their day-to-day operations and personnel and labor relations policies—are not public entities exempt from the Board's jurisdiction. In contrast to this clearly analogous precedent, the decisions that the majority relies on are distinguishable from this case. *Hinds County Human Resource Agency*, supra, 331 NLRB 1404; *Association for the Developmentally Disabled*, 231 NLRB 784 (1977); and *Madison County Mental Health Center*, 253 NLRB 258 (1980).

In *Hinds County*, a human resource agency was created pursuant to an enabling statute that specifically granted county boards the power to establish and operate

⁴ See also *Truman Medical Center*, 239 NLRB 1067 (1978), *enfd.* 641 F.2d 570 (8th Cir. 1981) (medical center, organized under State not-for-profit statutes and requiring no special legislative action or action by public officials, was no longer created directly by the State so as to constitute a department or arm of the government); *California Inspections Rating Bureau*, 215 NLRB 780 (1974) (nonprofit organization performing workers' compensation insurance rating function and created by virtue of State statutes found not to be political subdivision; not defined as State agency, had own labor relations policies, and operated like privately organized private utility within confines of license and State regulations).

tions of employment for its own employees without oversight by the judiciary. These employees do not receive special benefits granted to State employees, and are not otherwise treated as public employees.

human service agencies and intended that such agencies operate under local government control. *Id.* at 1404. The employer received virtually all of its funds from State and Federal Government sources, the amount and use of those funds was specified and controlled by governmental contracts and grants, and the employees had the option of participating in the State retirement system. In addition, the Hinds County board of supervisors approved each of the employer's new board members. *Id.* at 1405. By contrast, in this case there is no legislative mandate that the State Bar operate under local government control, the Bar does not receive State funds, the employees do not participate in the State retirement system, and neither the Court or any State entity approves the State Bar's board members.

In *Association for the Developmentally Disabled*, supra, the Board found the employer (ADD) to be exempt from its jurisdiction as an agency of Franklin County. ADD was created directly by the Franklin County Mental Health and Retardation Board, which was part of the government of Franklin County, to fulfill Franklin County's statutory obligation to provide mental health services. 231 NLRB at 784. Unlike the State Bar's, ADD's income was derived from mostly Federal, State, and county sources; several of its facilities were either owned by or were paid for in whole or in part by the State of Ohio or by Franklin County, and all of its non-expendable property was titled in the county board. *Id.* at 786. Further, in contrast to this case, the county board performed most of ADD's accounting, paid the salaries of ADD employees, purchased all items over \$50 for ADD, and required ADD to adhere to its policy and procedure manual and to Ohio's position classification booklet. Also unlike here, the staffers hired by the county board to set up and run ADD retained their status as public employees when they went to work for ADD, and were included in the Ohio retirement fund for public employees. *Id.* at 784.

In *Madison County*, supra, although the hospital was separately incorporated, 80 percent of its funding was from a government source, and the county board retained significant control over the hospital's day-to-day operations, including its labor relations policies. 253 NLRB at 259. In this case, by contrast, the State Bar receives none of its funding from public sources, and its executive director is responsible for its day-to-day operations and its labor relations policies.

The majority also relies on Federal court decisions holding that certain State bar associations are immune from suit under the 11th Amendment to the Constitution. Several are distinguishable on their facts, as the pertinent State bar associations have attributes of a government

entity that are not present here. See, e.g., *Kaimowitz v. Florida Bar*, 996 F.2d 1151 (8th Cir. 1993) (rules of Florida Supreme Court specifically stated that the State Bar of Florida was an official arm of the Court); *Lewis v. Louisiana State Bar Association*, 792 F.2d 493 (5th Cir. 1986) (State bar expressly set up as an agent of State Supreme Court, and Committee of Bar Commissioners were appointed by the Court).

To the extent, however, that the cited cases involve State bar associations that are similar in structure and function to the State Bar in this case, they are not dispositive of the issue under our statute. For example, in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996), the issue was whether the State bar was immune from suit under the 11th Amendment by private attorneys who were challenging how the bar used their mandatory membership dues.

Decisions involving the 11th Amendment have no bearing here. The question in such cases is whether private persons may sue state entities in Federal court. The 11th Amendment, of course, has no application to the exercise of Federal statutory authority by the Federal Government. See, e.g., *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, Missouri*, 411 U.S. 279, 286 (1973) (discussing authority of secretary of labor under Fair Labor Standards Act). Here, in contrast, the issue is whether a specific exemption from the coverage of a Federal statute, which is to be construed narrowly, bars the enforcement authority of the Federal agency charged with administering the statute.

In my view, the balance of the relevant factors weighs in favor of asserting jurisdiction in this case. And this view is consistent with Board precedent holding that similar quasi-public entities are subject to our jurisdiction.

III.

The majority does not reach the issue of whether the State Bar is exempt from Board jurisdiction under the second prong of the *Hawkins County* test. Under the second prong, an organization is exempt as a political subdivision if it is administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County*, supra, 402 U.S. at 604–605. The Regional Director correctly decided that the State Bar does not qualify as a political subdivision under this test either.

There is no evidence that the Board of Bar Commissioners, which administers the State Bar, is elected by or otherwise answerable to the "general electorate," and the State Bar does not contend otherwise. The State Bar argues, however, that the Bar Commissioners are respon-

sible to the State Supreme Court, who are themselves elected public officials.

In determining whether an entity is administered by individuals responsible to public officials, the Board looks to whether or not those individuals are appointed by and subject to removal by public officials. See *Regional Medical Center at Memphis*, 343 NLRB 346, 369 (2004); *Research Foundation of the City University of New York*, 337 NLRB 965, 969 (2002). In this case, the New Mexico Supreme Court has no authority to appoint or remove the Board of Bar Commissioners. The Commissioners are elected in districts by attorney-members of the State Bar. They elect their own officers. They select the executive director of the State Bar and have the sole authority to remove the executive director from his position. They serve for 3-year terms, and there is no evidence that the New Mexico Supreme Court has any authority to remove them.

The Board of Bar Commissioners may be accountable to the elected Supreme Court justices in some ways. The Court provides direction to certain of the State Bar's projects and must approve its budget. The Court made the rules that govern the State Bar, including establishing the districts in which the Commissioners are elected and the number of commissioners to be elected in each district, and the Court retains the authority to amend those rules. The Bar Commissioners themselves, however, and the executive director, retain almost complete control over the day-to-day operations of the State Bar, and none of those officials are either chosen by or subject to removal by the Supreme Court. Accordingly, the State Bar is not "administered" by anyone who is responsible to public officials.⁵

IV.

In finding the State Bar of New Mexico to be exempt from the coverage of the Act, the majority focuses on its quasi-public functions and certain indirect indices of control which the New Mexico Supreme Court exercises over it. I would focus, as other Board decisions have, on the State Bar's day-to-day operations and the personnel and labor relations issues that directly affect its employees. The New Mexico Supreme Court has little or no

⁵ See *St. Paul Ramsey Medical Center*, supra, 291 NLRB at 758 (medical center was not administered by individuals who were responsible to public officials, where there was no requirement that board of directors of the RHC and the hospital subsidiary corporation either be themselves public officials or be appointed by public officials, there was no provision in the statute providing for their removal by public officials, and the statute granted the board of directors of RHC and the hospital subsidiary corporation virtually complete autonomy with respect to the management and day-to-day operation of the Medical Center).

control over these matters; they are instead controlled by private actors who are acting within the structure of a private nonprofit organization. When viewed in this light, it seems clear that the State Bar does not qualify as a political subdivision under Section 2(2) of the Act. Accordingly, in agreement with the Regional Director, I would find that the Board has jurisdiction over the State Bar's employees, and I would process this petition.

APPENDIX

DECISION AND DIRECTION OF ELECTION

Communications Workers of America, Local 7011, AFL-CIO (the Union) filed a petition under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent certain employees employed by the State Bar of New Mexico (Employer or State Bar) at its 5121 Masthead Street NE, Albuquerque, New Mexico facility. The Employer contends that it is not subject to the jurisdiction of the National Labor Relations Board because it is an entity that falls within the exemption of Section 2(2) of the Act for "any State or political subdivision thereof." Contrary to the Employer, the Petitioner contends that the Employer is not a "political subdivision" of the State of New Mexico and is subject to the jurisdiction of the Board. The Employer also contends that the Web Master, which the Petitioner seeks to represent, should be excluded from the unit, because the Web Master is a managerial employee. Based on the reasons set forth below, I find that the record demonstrates that the Employer is not a "political subdivision" within the meaning of the Act's 2(2) exemption and is subject to the jurisdiction of the Board. I further find that the Employer's Web Master is not a managerial employee, and I will include her in the appropriate unit. I find an appropriate unit to consist of administrative assistants, desktop publishers, printers, assistants for publications/editors, marketing managers, referral assistants, secretaries/receptionists, systems clerks, mail clerks, graphic artists, and Web Masters, but excluding all other employees, staff attorneys, managers, confidential employees, guards, and supervisors as defined in the Act.

Based on factors relating to the Employer's creation and operations, its labor relations, and the application of legal precedent to these factors, I find that the Employer is not a political subdivision of a state as defined in Section 2(2) of the Act.

The Nature of the Employer's Creation

The Employer was initially created by statute in 1925 to operate as an agency of the New Mexico Supreme Court.³ This statute was revoked in 1978 by the legislature of New Mexico. Simultaneously with this revocation, the New Mexico Supreme Court created and continued the State Bar of New Mexico under Rule 24-101 of the rules governing the New Mexico Bar. Pursuant to this rule, the Employer was incorporated under the State of New Mexico in 1978, as a nonprofit corporation. As such and pursuant to this Rule, the Employer is able to sue and be sued, enter into contracts, and own and dispose of real prop-

³ Sec. 18-1-2, NM Statutes, 1925.

erty.⁴ Thus, the apparent sovereign immunity held by the previous agency was eliminated.

Rule 24-101 specifies the purposes for the creation of the Employer. Those purposes are listed as follows:

- To aid the courts in improving the administration of justice.
- To promote the interests of the legal profession in the State of New Mexico.
- To promote and support the needs of all members.
- To be cognizant of the needs of individual and minority members of the profession, including the full and equal participation of minorities and women in the state bar and the profession at large.
- To improve the relations between the legal profession and the public.
- To encourage and assist in the delivery of legal services to all in need of such services.
- To foster and maintain high ideals of integrity, learning, competence and public service.
- To provide a forum for the discussion of subjects pertaining to the practice of law and law reform.
- To promote and provide continuing legal education in technical fields of substantive law and practice.
- To participate in the legislative, executive and judicial processes by informing its membership about issues affecting the legal system and relating to the purpose of the state bar, and upon approval by the board of Bar Commissioners, to take such further action as may be necessary to present the views of the bar commission to the appropriate court, executive office or legislative body for consideration.

In addition to these missions, Rule 24-101B provides for several divisions of the Employer including the Young Lawyers Division, Senior Lawyers Division, and a Legal Assistants Division.

At the time of the New Mexico Supreme Court's enactment of the above Rule, the State of New Mexico adopted the following statute regulating attorneys. This statute specifically defines employees of the State Bar as non-public employees for purposes of various employee benefit programs:

The board of bar commissioners of the state bar and the state board of bar examiners are bodies of the judicial department and are not a state agency nor their employees public employees for purposes of workmen's compensation coverage, public employment retirement programs or social security coverage. New Mexico Statutes Annotated 1978, § 36-2-9.1

As a consequence of this statute, the members of the Board of Bar Commissioners receive no pay from the State of New Mexico, and their only compensation is for travel-related expenditures, which is paid to them directly by the Employer. A further consequence of the statute is that employees of the Employer are treated in a manner comparable to other private sec-

tor employees and enjoy none of the special benefits accorded to public sector employees.

The Nature of the Employer's Operations and Structure

The core composition of the Employer consists of the Board of Bar Commissioners, the executive director, and the officers. The Board of Bar Commissioners is the governing board of the Employer, comprised of 21 bar commissioners who are elected in districts by attorney-members of the State Bar. The New Mexico general electorate is not eligible to participate in this, or any other, election with respect to the Bar Commissioners. The New Mexico Supreme Court established the districts and number of bar commissioners to be elected from each district but has no authority to appoint bar commissioners. In addition to the bar commissioners elected by attorneys of the State of New Mexico, the Board of Bar Commissioners' membership includes a chair of the Young Lawyers Division and the elected delegate of the Senior Lawyers Division, chosen by attorney-members of those divisions. The bar commissioners also elect a president, a president-elect, a vice president, and a secretary-treasurer, all of whom are members of the Board of Bar Commissioners and serve in their office for a term of 1 year. There is no evidence in the record providing for the removal of bar commissioners by either the New Mexico Supreme Court or by the general membership of the State Bar.

The Board of Bar Commissioners wrote and adopted the bylaws of the State Bar (bylaws) for the Employer, not the State Legislature or the New Mexico Supreme Court. The bylaws provide that bar commissioners serve for 3 years and are subject to termination by the Board of Bar Commissioners if absent from three consecutive bar commission meetings or absent for a total of four bar commission meetings in any term year. A removed bar commissioner may appeal the removal to the Board of Bar Commissioners by making a written request for a hearing. The ultimate determination of the Board of Bar Commissioners is final.

Similarly, the final determination on the selection of the executive director is made by the Board of Bar Commissioners. The executive director (director) serves as the chief operating officer of the State Bar and is charged with the supervision of the Employer's employees. The Board of Bar Commissioners determines the director's compensation and has the authority to remove the director from office with or without cause. Like the petitioned-for employees supervised by the director, the director is not a state employee. The day-to-day operation of the State Bar is charged to the director, who implements the Bar's plans, programs, and policies, including the collection of funds to operate the State Bar.⁵

The executive director is charged with submitting an annual budget to the Board of Bar Commissioners. An independent auditor reviews the budget and verifies the appropriateness of the expenses. The budget is published in the Employer's Bar Bulletin with a detailed explanation of the right of each attor-

⁴ Rule 24-101A, rules governing the New Mexico Bar.

⁵ "All moneys collected by the Executive Director of the Employer are deposited in an account designated as the State Bar of New Mexico general fund and shall be disbursed by order of the Board of Bar Commissioners in carrying out the functions, duties and powers vested in said board." (Rule 24-102.)

ney-member to challenge whether any particular expense appropriately regulates the legal profession or enhances the quality of legal service to the people of the State of New Mexico. (§ 7.2) An extensive and detailed procedure is set forth in the bylaws explaining the appeal process any attorney-member of the State Bar can utilize to challenge any aspect of the budget. If a challenge is received, the Board of Bar Commissioners has the option of removing the challenged item from its budget, giving the challenger a pro-rata partial refund of his or her dues, or submitting the challenge to the New Mexico Supreme Court or its designee for an impartial decision. The final step of the budget procedure is approval of the budget by the New Mexico Supreme Court. On one occasion the Court remanded the budget for an amendment. Generally, budgets appear to have been approved by the Court without remand.

The New Mexico Supreme Court issued an order approving the State Bar Center Project on February 9, 1989. That order authorized the purchase of land, the construction of the building, the power of the Employer to raise funds from the members as well as from private sources, and a \$25 dues increase to assist in funding the purchase of the property. The Employer purchased the land and the Bar Center, which it holds as tenants-in-common with Special Projects, Inc.⁶ The Employer has a mortgage debt with a 15-year mortgage loan. The Employer pays property taxes on the Bar Center.

Although required to pay property taxes, the Employer is exempt from Federal income taxes as a Section 501(c) organization and not as a political subdivision. 26 U.S.C. § 115. There is no evidence that the Employer is exempt from other Federal, State, and local taxes.

In addition to providing for the holding of property and the paying of taxes, the bylaws permit the Employer to engage in extensive lobbying activities through the designation by the Board of Bar Commissioners of a legislative counsel, who registers as a lobbyist in accordance with the statutes and rules of the appropriate legislative body. Lobbying activities may also be conducted in whole or in part through a committee of the Employer.

The bulk of funding for the Employer's activities is derived from the revenue received by the Employer in annual license fees. The Employer is responsible for collecting annual license fees from its members, the amount of those fees being determined by the Board of Bar Commissioners. If a member fails to pay his or her fees, the Board of Bar Commissioners, through the executive director, certifies to the New Mexico Supreme Court the name of the member who failed to pay license fees. The New Mexico Supreme Court issues a citation to the member and orders the attorney-member to show cause to the New Mexico Supreme Court why that member should not be suspended from the right to practice law in the courts of New Mexico. If the New Mexico Supreme Court suspends a mem-

ber of the State Bar, that member must petition the Board of Bar Commissioners for reinstatement after paying all fees and penalties.

The Board of Bar Commissioners may waive a member's license fee in the case of extreme hardship. If the Board of Bar Commissioners refuses to modify the fee, the member may petition the New Mexico Supreme Court for a reversal of the Board of Bar Commissioners' decision. Any attorney-member in good standing of the Employer may file a petition with the New Mexico Supreme Court for voluntary withdrawal as a member of the State Bar. The New Mexico Supreme Court may then terminate that member from membership with the Employer. The attorney may thereafter be reinstated upon the payment of the appropriate fees to the Employer.

The revenue from fees is supplemented by revenue from other sources. The State Bar budget for 2002 was approximately \$2,203,900 with \$934,100 of that amount expected to be supported by nonlicense-fee revenue. The nonfee revenue, about 42 percent of the total revenue, is derived from advertisements in the Bar Bulletin and room rentals at the Bar Center. The remaining 58 percent of the Employer's revenue comes from fees assessments to members. The Employer is required to pay taxes to the State on fees it receives from advertising and room rentals.

The Employer is party to a nonrevenue producing administrative contract with the New Mexico Supreme Court, which calls for the Employer to oversee certain committees and boards to ensure the rules of the New Mexico Supreme Court are enforced. Those committees and boards include the Legal Advertising Committee of the Disciplinary Board, the Board of Bar Examiners, Legal Specialization Board, and the Minimum Continuing Education Board. The Employer oversees the personnel for these four programs as well as performs their book-keeping and other administrative services.

The Board of Bar Examiners is a distinct legal entity of the New Mexico Supreme Court that has been given the responsibility to grade the bar examinations. Although not specifically addressed in the record evidence, the Board of Bar Examiners appears to have their offices located in the Bar Center. There is no evidence that any of their employees are in the petitioned-for unit. A list of names of persons who have passed the bar examination is submitted by the Board of Bar Examiners to the Employer. The Employer, from that point on, is responsible for collecting dues from those attorney-members who must pay annual dues in order to maintain their license to practice law in the State of New Mexico.

Within the Disciplinary Board is the Legal Advertising Committee, which apparently is charged by the New Mexico Supreme Court with performing the first level of review of advertisements disseminated by New Mexico attorneys. A lawsuit was brought in 1995 against this committee by an attorney-member of the Bar. Defending this committee in litigation was an attorney from the Risk Management Division of the State of New Mexico General Services Department. There is no evidence in the record as to the reason behind the Risk Management attorney's defense of this committee or the compensation, if any, that was provided to the State of New Mexico for this defense.

⁶ Special Projects, Inc., which was incorporated in 1991, is a New Mexico corporation that provides high quality, affordable professional training and education programs and services primarily to the New Mexico legal community. Additionally, Special Projects sponsors, promotes, and assists social welfare projects and programs for the benefit and well being of persons in the State of New Mexico, including projects and programs for the public.

Although some evidence was presented regarding the operations of the Board of Bar Examiners and the Disciplinary Board, there is no evidence in the record as to the operations of the Legal Specialization Board or the Minimum Continuing Education Board.

The Employer publishes a periodical entitled Bar Bulletin that notifies the membership of case holdings in New Mexico courts, minutes of various meetings including the bar commissioners' meetings, committees of the Employer, and other items of interest to the membership. There is no statutory requirement that requires that minutes from the Board of Bar Commissioners' meetings be published for public review. The Employer has its own editor and print shop where the Bar Bulletin is printed and disseminated to the attorney-membership. The Clerk of the New Mexico Supreme Court notifies the Employer of its State Supreme Court case holdings and provides copies of them to the Employer for publication in the Bar Bulletin. Although the Employer works with the New Mexico Compilation Commission in receiving court decisions and opinions for publication, only this Commission, a state agency, is mandated by statute to publish court opinions.

The Employer's Labor Relations

As noted, the State of New Mexico has specifically provided⁷ that the Employer's employees are *not* public employees for purposes of participating in worker's compensation, public retirement programs, or social security coverage. Employees do not receive their paychecks from state entities, are not subject to state civil service rules, and are not allowed to transfer to another state position. Employees are hired directly by the Employer, trained by the Employer, and subject to the Employer's personnel policies.

The Employer's management implemented an extensive employee handbook (handbook) without any apparent oversight or approval of the New Mexico Supreme Court or any other public entity with respect to the terms and conditions set forth in the Handbook. The handbook is prefaced with the bolded notation:

This Handbook can be modified at any time, without notice and without a written revision of the Handbook. The Handbook is not a contract with employees and contains guidelines only regarding policies and procedures.

The 62-page handbook, adopted by the Employer's management on October 1, 2000, covers 58 topics which encompass virtually every aspect of the terms and conditions of employment of the Employer including, among other things, attendance, chain of command, disciplinary procedures, dress code, drug and alcohol policies, a grievance procedure, various leave provisions, and performance appraisals.

The handbook opens with an "overview" which states that prior to 1978 the State Bar was an agency of the New Mexico Supreme Court but is now incorporated. It defines the Employer's purpose as:

to aid the courts in administering justice and preserving the rule of law, and to foster a high standard of integrity and competence within the legal profession.

The purpose of the handbook is defined as providing the employees with general information, subject to change by the Employer at any time:

The handbook is merely a guide and is not a contract with employees. (Emphasis in original.) . . . the State Bar of New Mexico reserves the right to deviate from the guidelines and practices outlined in this handbook, if in management's judgment, such deviation is warranted based on facts of a particular situation. . . the practices and guidelines described in this handbook may be changed, and the State Bar reserves the right to do so at our sole discretion. Revisions may include changing, rescinding, or adding to any procedure, benefit, or practice described in this handbook. Revisions may be made without prior notice to employees.

Changes in procedures, benefits or practices will not change the mutual "at-will" relationship between the State Bar of New Mexico and the employee.

This handbook can be modified at any time, without notice and without written revision of the handbook.

This handbook is intended solely for use by the State Bar of New Mexico and its employees . . .

The Handbook is online and available on the State Bar of New Mexico G: Drive NT server . . . The handbook is also available from the Human Resources Department or from each employee's supervisor.

It is evident from the above introductory language that the handbook was created by the management of the Employer and the management may modify the terms and conditions of employment of its employees at any time. Moreover, the Employer's management is empowered to implement changes without any oversight or approval mandated from other authorities.

Provisions in the Handbook provide insight into the relationship between the Employer and its employees. Under "Complaint Resolution (Grievances)" no recourse is provided to any sort of governmental body. Rather, the final decision with respect to all employee grievances rests with the executive director. Similarly, under "Disciplinary/Corrective Action," the Employer states:

noncompliance or failure to correct performance deficiencies may result in further corrective or disciplinary sanctions, up to and including termination

. . . . Satisfactory completion or compliance of the disciplinary/corrective period does not in any way alter the "at will" employment relationship[.]

Under "Separation of Employment," the Employer delineates that it has the power to "terminate employment relationships at any time, with or without cause or reason, with or without prior notice." No portion of the Employer's comprehensive Handbook provides for any recourse by employees to any governmental body with respect to grievances, discipline, or any employee concerns. The handbook emphasizes repeatedly that

⁷ New Mexico Statute 36-2-9.1.

the sole authority over virtually all terms and conditions of employment of the employees is the Employer, its management, and the executive director.

For purposes of administering Equal Employment Opportunity laws, the Handbook assigns authority to the “(1) Equal Employment Opportunity Officer, who is the executive director, (2) the Manager of Human Resources, and (3) the Management staff of the State Bar of New Mexico.” There is no mention of recourse to any state agency or state personnel board. The “Chain of Command” portion of the handbook terminates with the Board of Bar Commissioners designated as the ultimate authority.

Under Family Medical Leave Act (FMLA) leave, the handbook notes that the FMLA statute applies only to employers that employ 50 or more employees who live within a 75-mile radius. Based on this requirement, the Employer is not required to comply with the FMLA at this time.

The Employer provides its own benefits package which includes vacation, sick leave, a private 401(k) fund, dental and vision care, a cafeteria health plan, short and long-term disability, and an employee assistance program. Employees do not participate in any public employee pension or benefit plans. Employee salaries are paid from the Employer’s budget. The State has no control over the employees, nor do the employees consider themselves state employees. It appears that the New Mexico Supreme Court has no authority to interfere in any way with the hiring, promoting, training, discharging, or the performance of any of the employees working for the Employer. There is no state employer-supervisor in the chain of command of the employees, and they are clearly disciplined by supervisors employed by the Employer.

No party maintains that the elected attorney-member bar commissioners are employees of the Employer and the bylaws provide for bar commissioners to receive only reimbursement for expenses they incur in the performance of their duties.

Applicable National Labor Relations Board and Court Law

In order to determine whether entities are political subdivisions exempt from the Act, the entity must either be (1) created directly by the State so as to constitute departments or administrative arms of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 91 S.Ct. 1746 (1971).

The legislative history of the Act indicates that “Congress enacted the Section 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.” *Id.* at 604. Courts have further suggested that the political subdivision exemption “has its ultimate basis in the Tenth Amendment considerations of state sovereignty and the Eleventh Amendment grant of judicial immunity to the states.” *Crestline Memorial Hosp. Assn. v. NLRB*, 668 F.2d 243, 245 fn. 1 (6th Cir. 1982). The Supreme Court has stated that state law is not controlling on the question of whether an entity is a political subdivision and that it is the “actual operations and characteristics” of the entity that the National Labor Relations Board must examine in determining whether the en-

tity is exempt from the Act’s coverage. *Hawkins County* at 603–604.

In applying such an examination, the Board, in *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988), found that the employer was not a political subdivision after a new state act created the employer. In *St. Paul*, the Board found that although the medical center was once an exempt political entity, the balance of the relevant statutory provisions of the new state act creating a nonprofit public corporation indicated that the state no longer intended the medical center and the hospital subsidiary corporation to be established as departments or administrative arms of the government. See also *California Inspection Rating Bureau*, 215 NLRB 780 (1974), where an organization was created by virtue of state statutes but was found not to be a political subdivision.

In contrast is *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000), where the enabling statute specifically indicates that it is the legislature’s express intention that the relevant human resource agencies operate under local governmental control. Further contrast is found in *Camden-Clark Memorial Hospital*, 221 NLRB 945 (1975), where the hospital was not separately incorporated or otherwise organized so as to have a separate legal identity apart from the city.

The second standard enumerated in *Hawkins County* requires “an entity . . . [to] demonstrate that its policy-making officials have direct personal accountability to public officials or to the general public.” *NLRB v. Princeton Memorial Hospital*, 939 F.2d 174, 178 (4th Cir. 1991). In determining whether the employing entity is administered by individuals responsible to public officials for purposes of the political subdivision exemption, courts and the Board reversed prior holdings⁸ and ruled that the Board will find that “individuals are responsible to the general electorate under *Hawkins County* only if the relevant electorate is the same as that for general political elections.” *Enrichment Services Program Inc.*, 325 NLRB 818, 819 (1998). In *Concordia Electric Cooperative*, 315 NLRB 752, 754 (1994), *enfd.* 95 F.3d 46 (5th Cir. 1996), the Board found that they would find an entity “responsible to the general electorate” only if the composition of the group of electors eligible to vote for the entity’s governing body is sufficiently comparable to the electorate for general political elections. Thus, the entity in question must be subject to the same type and degree of popular political control as found in a general political election. *Id.* at 755.

Applying these principles to the facts of this case, I find that the Employer was not created by the State of New Mexico so as to constitute a department or administrative arm of the government. The Employer is a nonprofit corporation created to enhance the legal profession and provide services to the attorneys of New Mexico. Its bylaws and operating policies were not created nor implemented by the New Mexico Supreme Court, but by the elected attorney-members of the Board of Bar Commissioners. Its employees are not considered public employees by statute and appear to have none of the terms and conditions of state employees; its funding is strictly from private sources

⁸ *Woodbury County Community Action Agency*, 299 NLRB 554 (1990); and *Economic Security Corp.*, 299 NLRB 562 (1990).

with no state monies funding its operations; and it may engage in lobbying activities. The State of New Mexico would not tax itself and the Employer, in this regard, is required to pay property tax on the Bar Center. The Employer fails the first standard of *Hawkins County* for political subdivision.

In applying the second standard of *Hawkins County*, a close examination of the Employer's governing board's creation, operations and election is necessary. The governing board of the Employer is the Board of Bar Commissioners, licensed attorneys elected by their fellow licensed attorneys to serve as commissioners for the State Bar. Bar commissioners are neither appointed by the state nor subject to removal by public officials. The only evidence of a cause for removal of bar commissioners is an automatic termination for missing three consecutive meetings or missing four within a year, a cause established by the Employer itself. This termination may be appealed to the Board of Bar Commissioners. The New Mexico Supreme Court, thus, has no defined responsibility in the appointment or removal of bar commissioners. The New Mexico Supreme Court's sole role in the process is the establishment of the districts from which the bar commissioners are elected and the number of bar commissioners from those districts. The Executive Director and officers of the Employer are selected by the Board of Bar Commissioners. The Board of Bar Commissioners also has the sole authority to remove the executive director from that position. The positions of the officials of the Employer who are charged with supervising and implementing the labor relations of employees were not created by the enabling statute but by the Employer's bylaws.

The evidence establishes that the bar commissioners are not elected by the general electorate for general political elections. The "group of electors" are attorney-members licensed to practice law in the State of New Mexico. This is an esoteric and restricted membership and is incomparable to the electorate for general political elections in New Mexico. The group of electors for the Board of Bar Commissioners is comprised of members of a profession that requires specialized education, a strenuous bar examination, and payment of dues and fees, all prerequisites for eligibility to vote for the governing board of the Employer that the general electorate cannot meet.

There is no requirement in the Rules of the New Mexico Supreme Court that require the Board of Bar Commissioners meetings to be open to the public or that minutes of their meetings be published. For this and all of the above reasons, the Employer fails the second standard of the *Hawkins County* test.

The Employer fails to establish that it satisfies either standard of *Hawkins County*. The Employer was neither created by the state so as to be a governmental entity or an administrative arm of the state nor are the bar commissioners directly accountable to public officials or the general public. The Employer has argued that other state bars have successfully argued that they are immune from suit by virtue of the Eleventh Amendment of

the United States Constitution.⁹ This position is in direct contradiction to the Employer's own rules¹⁰ which appear to reject sovereign immunity and specify that the Employer may "sue and be sued."¹¹ The United States Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990), allowed the state bar to be sued, finding that the "... very specialized characteristics of the State Bar of California. . . . served to distinguish it from the role of the typical government official or agency. The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession." The Court found that the State Bar was more analogous to a labor union than to a governmental agency. *Id.* at 2232.

Accordingly, I find that the Employer is not a political subdivision under Section 2(2) of the Act. The Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

....

In sum, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time administrative assistants, desktop publishers, printers, assistants for publications/editors, marketing managers, referral assistants, secretaries/receptionists, systems clerks, mail clerks, graphic artists, and Web Masters, employed by the Employer at its 5121 Masthead Street NE, Albuquerque, New Mexico facility.

EXCLUDED: All other employees, staff attorneys, managers, confidential employees, guards and supervisors as defined in the Act.

There are approximately 38 employees in the unit found appropriate.

....

⁹ *Thiel v. State Bar of Wisconsin*, 94 F. 3d 399 (7th Cir. 1996), where the state bar members sued the State Bar of Wisconsin to prohibit the bar from funding certain activities with compelled dues. *Kaimowitz v. Florida Bar*, 996 F. 2d 1151 (11th Cir. 1996), which involved a state bar member who filed a civil rights suit against a state bar but where, unlike the New Mexico Rules, the Rules of the Florida Supreme Court specifically state that the State Bar of Florida is an arm of the Supreme Court.

¹⁰ Rule 24-101A, Rules Governing the New Mexico Bar.

¹¹ Rule 24-101A, Rules Governing the New Mexico Bar.